**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of ruling dated October 17, 2012 of the judicial composition of Supreme Court of the Republic of Azerbaijan on re-consideration on newly discovered facts of judicial acts in force on A.Yahyazada’s complaint with Constitution and laws of the Republic of Azerbaijan*

**16 July 2013 Baku city**

Plenum of Constitutional Court of the Republic of Azerbaijan, composed of Farhad Abdullayev (Chairman), Sona Salmanova, Sudaba Hasanova (Reporter Judge), Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Mahir Muradov, Isa Najafov and Kamran Shafiyev,

attended by the Court Clerk Elmaddin Huseynov,

applicant Azad Yahyazada and his representative Kanan Aliyev,

representative of respondent body Elkhan Kazimov, Head of Department of Summarization of Court Practice and Analysis of Court Statistics of Secretariat of Supreme Court of the Republic of Azerbaijan,

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the constitutional case on complaint of A.Yahyazadain in connection with verification of conformity of ruling of October 17, 2012 of the judicial composition of Supreme Court of the Republic of Azerbaijan on re-consideration on newly discovered facts of judicial acts in force with Constitution and laws of the Republic of Azerbaijan.

Having heard the report of Judge S.Hasanova, the reports of legal representatives of the interested subjects, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

By the decision of Goychay Region Court of May 31, 2007 a case of plaintiff Yahyazada Rafael Seyfulla against Yahyazada Azad Azer and Goychay Region State Notary Office No. 2, were sustained, the written will made on September 29, 1991 in the same office on behalf of Badirova Malaksuma Jabrayil was considered as invalid and the relevant inheritance certificate was terminated.

The Civil Board of Court of Appeal of Sheki city by its decision dated April 11, 2008 did not provide the appeal complaint of respondent A.Yahyazada and upheld the decision of Goychay Region Court.

The Civil Board of Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the Supreme Court) by its decision dated August 8, 2008 did not provide the cassation complaint of A.Yahyazada and upheld the decision of appeal instance.

By the Ruling of October 17, 2012 of the judicial composition of Supreme Court of the Republic of Azerbaijan on re-consideration of newly discovered facts and legally valid judicial acts it was refused to accept the statement of A.Yahyazada for consideration at the Plenum of the Supreme Court.

Applicant, by applying to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), requested verification of conformity of the Ruling dated October 17, 2012 of the judicial composition of Supreme Court of the Republic of Azerbaijan on re-consideration on newly discovered facts of judicial acts in force with Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) and laws of the Republic of Azerbaijan.

It was indicated in the complaint that decision of court of first instance was made on the ground of opinion of court handwriting examination conducted between signature in the written will of M.Badirova made in Goychay region State Notary Office No. 2 on July 29, 1991 and other sample of signature in act dated 1960 belonging to testator M.Badirova presented to court by plaintiff R.Yahyazada. Further, A.Yahyazada, by applying to corresponding bodies, obtained petition in connection with work record book and pension - documents with free samples of signature of testator M.Badirova and determined that act presented to court by R.Yahyazada is false. After this, A.Yahyazada applied to Goychay region prosecutor’ office in connection with using by R.Yahyazada of falsified document in court. In accordance with opinion of court handwriting examination assigned by prosecution’s office during investigation of new received documents, authenticity of samples of signature of A.Yahyazada in submitted documents with the signature in disputes written will was affirmed and signature in the act was rejected. Commencement of crime case on R.Yahyazada was rejected due to expiry of period of involvement to crime responsibility by decision of June 20, 2012 of Goychay region Prosecution’s Office.

According to A.Yahyazada’s opinion, by the Ruling of October 17, 2012 of the judicial composition of Supreme Court on re-consideration on newly discovered facts of judicial acts in force, his constitutional right on legal protection of rights and freedoms was infringed without consideration of his petition, requirements of Article 432.2.1 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), the legal norms, which had to be applied have not been applied.

In connection with the complaint, Plenum of the Constitutional Court notes the following.

According to the Article 26 of the Constitution, everyone has the right to protect his/her rights and liberties using means and methods not prohibited by law. The state guarantees protection of rights and liberties of all people.

This guarantee is also realized by means of legal protection. To observe and protect the rights and freedoms of the person and the citizen enshrined in the Constitution is an obligation of bodies of the legislative, executive and judicial authorities (Article 71.1 and Article 60.1 of the Constitution).

According to civil legal proceedings the justice directed to establishment of legality and public order, protection of all types of property, education of citizens in the spirit of respect for laws is realized only by courts and in the order established by the law.

Plenum of Constitutional Court indicates that re-consideration on newly discovered facts of judicial acts in force is considered as a special type of civil legal proceeding and such proceeding is significantly different from consideration of case in appeal and cassation order. Thus, consideration of case in such proceeding will not be affected by court failures, ungrounded court decisions, incorrect application of substantive-legal norms by court or infringement of procedural legal norms, but result during making decisions and existence of case which is particularly significant for case.

It is necessary to consider that the newly discovered facts which is not known or cannot be known to the applicant, it is considered important for case when knowledge of a fact in essence serves for more fair conducting of judicial investigation.

The purpose of reconsideration of the case on newly discovered facts is not elimination of miscarriages of justice, but consideration of the case on the facts known after adopting of decision.

Rules of procedure concerning re-consideration on newly discovered facts of judicial acts in force is regulated by chapter 45 of the CPC.

Article 432 of the above-mentioned Code providing for re-consideration of a case, determines four independent grounds for re-consideration of court acts based upon newly discovered facts:

 - 432.2.1 discovery, after adoption of court act, of decisive materials not known in the course of previous hearing;

- 432.2.2 intentional rendering of false testimony by witness, of false opinion - by expert, of false translation by interpreter, forgery of documents or material evidence established by entered into legal force court verdict and resulting in issuance of illegal or groundless resolution;

- 432.2.3 criminal activities in the course of case review of parties, other persons participating in case or their representatives as well as criminal actions of judges established by entered into legal force court verdict;

- 432.2.4 cancelation of resolution, verdict, ruling or decision of court or decision of other body serving as a ground for adoption of the court act.

If any of grounds indicated in abovementioned article is existed and petition issued on newly discovered facts to legal enforced court acts meets the requirements of Articles 434-435 of the CPC, the case should be forwarded to for consideration by the Plenum of Supreme Court.

Thus, in accordance with Article 433 of the CPC, legal acts in force shall be re-considered on newly discovered facts by the Plenum of the Supreme Court of the Republic of Azerbaijan.

The institute of re-consideration upon newly discovered facts of judicial acts in force in the civil procedural legislation of many countries (Russia, Ukraine, Moldova, Kazakhstan, Georgia) is determined differently. Thus, by the legislation of these countries consideration of the judicial acts in force on newly discovered facts belongs to powers of the court, which adopted the judicial act. It can be the court of first instance and courts of appeal and cassation instances.

In accordance with civil procedure legislation of the Republic of Georgia, in case of existence of decisions of several court instants on one case, re-consideration on newly discovered facts of legal valid court acts was concerned to authority of the highest court instance.

By civil procedure legislation of the Republic of Azerbaijan, granting of such authority to the Plenum of Supreme Court serves for formation of single court practice in the sphere of civil judgment, along with being guarantee for provision of stability of court decisions.

In accordance with law N: 136-IVQD of May 31, 2011 of the Republic of Azerbaijan on “Alteration to the Civil Procedure Code of the Republic of Azerbaijan”, the Article 437 assuming re-consideration on newly discovered facts was released in new edition. In accordance with requirement of this article, petition lodged on newly discovered facts is considered by judicial composition consisting of five judges assigned by the Plenum of Supreme Court. In case of existence of circumstance that not allowing the consideration of case by judge from the judicial composition, Chair of Supreme Court will alternate such judge with one of 5 reserved judges assigned by the Plenum of Supreme Court.

In accordance with Article 437.2 of the CPC, judicial composition considers the petition and accepts one of following rulings:

- on return of petition if requirements of Article 435 of this Code on content of petition is not observed (applicant may re-apply the petition after elimination of faults causing its return) (437.2.1);

- on rejection of petition in case of absence of ground provided for in Article 432.2 of this Code (437.2.2);

- on sending of petition together with case to Plenum of Supreme Court of the Republic of Azerbaijan in case of compliance with the requirements provided for in Article 432.2 of this Code and observance of requirements of Article 435 of this Code on content of the petition (437.2.3).

After adoption by judicial structure of the decision on the direction of the petition to the Plenum of the Supreme Court for consideration of the judicial act on newly discovered facts the application is considered at the Plenum’s meeting. To the applicant and other persons participating in case sending the judicial notice on time and the place of a meeting of the Plenum, however their absence does not interfere with consideration of the application (Article 437.4 of the CPC).

Although A.Yahyazada grounded his petition to Plenum by Article 432 of the CPC, judicial composition on re-consideration of court acts on newly discovered facts did not discuss the conformity of petition to any of four ground considered in this article, and grounded its decision by non-determination of falsification of documents and criminal offense by persons participating in case, their representatives, as well as other persons in order determined by law, i.e. by court resolution and decision, whereas Article 432.2.1 of the CPC considers detection of decisive materials not known in the course of previous hearing after adoption of court act, as independent ground for consideration of such petitions.

In the challenged ruling of judicial composition by referring only to Article 432.2 of the CPC comes to a conclusion that for allowance of the petition the judgment or a sentence on the specified argument shall be pronounced. Whereas, on the substance of Article 432.2.1 of the CPC for the application of the basis of detection of decisive materials not known in the course of previous hearing of case does not require availability of any court decision or a sentence.

According to the formed legal position of the Plenum of the Constitutional Court, settlement of cases by observing the substantial and procedural legal norms in all judicial instances comprises legal ground for lawfulness and fairness of made court acts and excludes the possibility of doubts (decision of the Plenum of Constitutional Court of July 13, 2009 on complaint of S.Teymurova).

The Plenum of the Constitutional Court also notes that within legal protection of the rights and freedoms it is possible to lodge an appeal to the court to the decision and action (inaction) of any state bodies. The impossibility of re-consideration of the wrong judicial act does not correspond to a universal order of effective restoration of the rights by means of justice, violates and limits this right. Impossibility of re-consideration of incorrect court act is not in conformity with universal order of effective restoration of rights through justice; it infringes and limits such law. Institutional and procedural provisions of re-consideration of incorrect court acts should meet requirements of use of procedural effective court protection means and transparent realization of justice and exclude the prolongation of court investigation. Thus, court should provide the fairness of court decision and as well as legal certainty of validity and non-denial of court decisions. Otherwise, balance of public and private legal interests would be impossible.

Such approach especially proves in interpretation of the European Court of Human Rights (hereinafter referred to as the European Court) of the right for fair trial fixed in Preamble of Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention). In accordance with opinion of European Court, one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question (decisions of the European Court of October 28, 1999 on case of Brumaresku v. Romania, of November 18, 2004 on case of Pravednaya v. Russia, of May 24, 2007 on case of Bulgakov v. Russia).

According to the legal position of the European Court that is expressed in the decision of July 12, 2007 on case of Vedernikova v. Russia, the Convention in principle tolerates the reopening of final judgments if new circumstances are discovered. For example, Article 4 of Protocol No. 7 expressly permits the State to correct miscarriages of criminal justice. A verdict ignoring key evidence may well constitute such a miscarriage. Thus, Article 4 of Protocol No. 7 of the Convention enables state to correct the faults of crime justice method unambiguously and such faults attribute to the court decisions, on which information on main evidences on the case is not reflected. European Court, by interpreting of Article 4 of Protocol No.7 of the Convention in interaction with the Article 6 of this Convention, attributed them also to civil cases. European Court accepts that in certain circumstances legal certainty can be disturbed in order to correct a “fundamental defect” or a “miscarriage of justice”. At the same time according to the European Court the procedure for quashing of a final judgment presupposes that there is evidence not previously available through the exercise of due diligence that would lead to a different outcome of the proceedings. The person applying for rescission should show that there was no opportunity to present the item of evidence at the final hearing and that the evidence is decisive (decisions of November 18, 2004 on case Pravednaya v. Russia, of July 23, 2009 on case Sutyazhnikv. Russia).

In that respect, from materials of the challenged civil case it is clear that the personal documents of M. Badirova stored in public authorities with samples of the signature, A. Yakhyazada has got by means of prosecutor's office only after the appeal to Goychay regional prosecutor's office. Also, from the documents attached to A. Yakhyazada's complaint addressed to the Constitutional Court it becomes known that there are expert reports that contradict to each other.

Plenum of the Constitutional Court considers that after entry into force of the challenged judicial acts the judicial composition did not give an assessment and did not paid attention to facts newly discovered as a result of public prosecutor's examination and to their crucial role in accordance with requirements of Article 432.2.1 of the CPC.

At the same time, judicial composition did not considered that for allowance of the application concerning re-consideration on newly discovered facts of judicial acts in force the presence of all or simultaneously several bases specified in the law was not requested.

From this point of view, failure to observe the requirements of civil procedural law during consideration of case caused infringement of A.Yahyazada’s right of legal protection provided for by Article 60.1 of the Constitution.

Considering abovementioned the Plenum of Constitutional Court comes into conclusion that ruling of October 17, 2012 of the judicial composition of Supreme Court of the Republic of Azerbaijan on re-consideration on newly discovered facts of judicial acts in force on case of R.Yahyazada against A.Yahyazada and State Notary Office No.2 concerning invalidity of the will and cancellation of the certificate on an inheritance right shall be considered as null and void in connection with its discrepancy with Article 60.1 of the Constitution and Article 437 of the CPC. According to the present decision the petition on re-consideration of court acts in connection with this case on newly discovered facts should be re-considered in order and terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize the Ruling dated October 17, 2012 of the judicial composition of Supreme Court of the Republic of Azerbaijan on re-consideration upon newly discovered facts of judicial acts in force on case of Yahyazada Rafael Seyfulla against Yahyazada Azad Azer and Goychay region State Notary Office No. 2 concerning invalidity of the will and cancellation of the inheritance right certificate as null and void in connection with its discrepancy with Article 60.1 of the Constitution and Article 437 of the Civil Procedure Code of the Republic of Azerbaijan. According to this decision the petition on re-consideration of court acts in connection with this case upon newly discovered facts should be re-considered in order and terms established by the civil procedure legislation of the Republic of Azerbaijan.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.